Supreme Court, U.S.
FILED
APR 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1279

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL, APPELLANT

v.

THEODORE B. OLSON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

LOUIS R. COHEN
WILLIAM C. BRYSON
Deputy Solicitors General

JAMES M. SPEARS
ROBERT J. CYNKAR
Deputy Assistant Attorneys General

EDWIN S. KNEEDLER
RICHARD G. TARANTO
Assistants to the Solicitor General

ROBERT E. KOPP
DOUGLAS LETTER
THOMAS M. BONDY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will address the following question:

Whether the Ethics in Government Act of 1978 violates the Constitution in providing for a court-appointed "independent counsel" who is empowered to conduct criminal prosecutions but who is not accountable to the President for the exercise of that power.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Introduction and summary of argument	1
Argument:	
I. The independent counsel statute unconstitutionally takes executive power from the President	5
II. The independent counsel statute violates the Appointments Clause	16
A. The Appointments Clause does not permit Congress to vest the appointment of executive officers in the courts of law	17
B. An officer who exercises prosecutorial power, and who is not subordinate to anyone in the exercise of that power, is not an "inferior" officer	24
III. The limitations on the removal of the independent counsel are inconsistent with this Court's decisions in *Myers*, *Humphrey's Executor*, and *Wiener*	29
IV. Neither this Court's decisions nor prior federal practices provide precedent for vesting purely executive power in an officer who is appointed by a court and is not accountable to the President	33
V. The independent counsel statute is not constitutionally justified by Congress's desire to eliminate supposed conflicts of interest in certain criminal investigations and prosecutions	41
Conclusion	50

TABLE OF AUTHORITIES

Cases: Page

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967) 2
American Trucking Ass'ns, Inc. v. *ICC*, 747 F.2d 787 (D.C. Cir. 1984) 2
Anderson v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821) 35
Atkins v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978) 45
Barry v. *United States ex rel. Cunningham*, 279 U.S. 597 (1929) 35-36
Blair v. *United States*, 250 U.S. 273 (1919) 2
Bowsher v. *Synar*, No. 85-1377 (July 7, 1986) 1, 2, 5, 9, 11, 15, 19, 37 41
Brown v. *United States*, 359 U.S. 41 (1959) 11
Buckley v. *Valeo*, 424 U.S. 1 (1976) ..... *passim*
CFTC v. *Schor*, No. 85-621 (July 7, 1986) 42, 43
Chabal v. *Reagan*, No. 87-5751 (3d Cir. Mar. 14, 1988) 32
Chandler v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970) 15
Collins v. *United States*, 14 Ct. Cl. 568 (1879) 25, 27
Confiscation Cases, 74 U.S. (7 Wall.) 454 (1869) 11
Connelly v. *United States*, 249 F.2d 576 (8th Cir. 1957), cert. denied, 356 U.S. 921 (1958) 47
Gardner v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967) 2
Go-Bart Importing Co. v. *United States*, 282 U.S. 344 (1931) 40
Hayburn's Case, 2 U.S. (2 Dall.) 409 (1791) 23
Heckler v. *Chaney*, 470 U.S. 821 (1985) 10
Hennen, Ex parte, 38 U.S. (13 Pet.) 230 (1839) 18, 22, 26, 34
Hobson v. *Hansen*, 265 F. Supp. 902 (D.D.C. 1967) 18, 40
Humphrey's Executor v. *United States*, 295 U.S. 602 (1935) 9, 29, 30, 31
INS v. *Chadha*, 462 U.S. 919 (1983) 1, 15, 19, 31, 37, 41
Jones v. *United States*, 179 F. 584 (9th Cir. 1910) 48
Kendall v. *United States*, 37 U.S. (12 Pet.) 524 (1838) 8, 9

Cases—Continued: Page

Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973) 37
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 41
McGrain v. *Daugherty*, 273 U.S. 135 (1927) 36, 38
Miller v. *United States*, 24 F.2d 353 (2d Cir.), cert. denied, 276 U.S. 638 (1928) 47
Morgan v. *TVA*, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941) 32
Muskrat v. *United States*, 219 U.S. 346 (1911) 23
Myers v. *United States*, 272 U.S. 52 (1926) ..... *passim*
Nathan v. *Smith*, 737 F.2d 1069 (D.C. Cir. 1984) 16
National Petroleum Refiners Ass'n v. *FTC*, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974) 29-30
Neagle, In re, 135 U.S. 1 (1890) 8
Nixon v. *Administrator of General Services*, 433 U.S. 425 (1977) 41-42
North, In re, No. 86-6 (D.C. Cir. Indep. Counsel Spec. Div. (Order of Dec. 19, 1986)) 14
Northern Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 26
Olson, In re, 818 F.2d 34 (D.C. Cir. Indep. Counsel Spec. Div. 1987) 14
Ponzi v. *Fessenden*, 258 U.S. 254 (1922) 10
President's Comm'n on Organized Crime (Subpoena of Scarfo), In re, 783 F.2d 370 (3d Cir. 1986) 23
Rice v. *Ames*, 180 U.S. 371 (1901) 40
Sealed Case, In re, 829 F.2d 50 (D.C. Cir. 1987), cert. denied, No. 87-869 (Jan. 19, 1988) 14
Siebold, Ex parte, 100 U.S. 371 (1880) 33, 34, 35, 36, 37, 40
Springer v. *Philippine Islands*, 277 U.S. 189 (1928) 10
Synar v. *United States*, 626 F. Supp. 1374 (D.D.C. 1986), aff'd, No. 85-1377 (July 7, 1986) 30
Tyner v. *United States*, 23 App. D.C. 324 (D.C. Cir. 1904) 48
Ullman v. *United States*, 350 U.S. 422 (1956) 11
United States v. *Agnew*, 428 F. Supp. 1293 (D. Md. 1977) 47

Cases—Continued: Page

United States v. *Allred*, 155 U.S. 591 (1895) 40
United States v. *Babcock*, 24 F. Cas. 913 (C.C.E.D. Mo. 1876) (No. 14,487) 47
United States v. *Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693) 47
United States v. *Chanen*, 549 F.2d 1306 (9th Cir.), cert. denied, 434 U.S. 825 (1977) 11
United States v. *Cox*, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965) 11
United States v. *Deaver*, No. 87-096 (D.D.C. June 22, 1987) 12
United States v. *Eaton*, 169 U.S. 331 (1898) 27
United States, Ex parte, 287 U.S. 241 (1932) 11
United States v. *Ferreira*, 54 U.S. (13 How.) 40 (1851) 23
United States v. *Gatto*, 763 F.2d 1040 (9th Cir. 1985) 11
United States v. *Germaine*, 99 U.S. 508 (1879) 25, 27
United States v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868) 27
United States v. *Malebran*, 26 F. Cas. 1145 (C.C.D.N.Y. 1820) (No. 15,711) 37
United States v. *Mendoza*, 464 U.S. 154 (1984) 11
United States v. *Nixon*, 418 U.S. 683 (1974) 10, 11, 27, 48
United States v. *Perkins*, 116 U.S. 483 (1886) 9
United States v. *San Jacinto Tin Co.*, 125 U.S. 273 (1888) 8
United States v. *Sells Eng'g, Inc.*, 463 U.S. 418 (1983) 11
United States v. *Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963) 39
United States v. *Thompson*, 251 U.S. 407 (1920) 11
United States v. *Trobe*, 28 F. Cas. 217 (D.C.W.D. Pa. 1865) (No. 16,541) 37
United States v. *Will*, 449 U.S. 200 (1980) 45
United States ex rel. Marcus v. *Hess*, 317 U.S. 537 (1943) 37
Wayte v. *United States*, 470 U.S. 598 (1985) 11
Wiener v. *United States*, 357 U.S. 349 (1958) 31
Wilcox v. *Jackson*, 38 U.S. (13 Pet.) 498 (1839) 10
Young v. *United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987) 10, 44

Constitution, statutes, regulations and rule: Page

U.S. Const.:
Art. I:
§ 1 1
§ 2, Cl. 5 46
§ 3, Cl. 6 46
§ 4 33
§ 5, Cl. 1 35
§ 6 45
§ 8:
Cl. 17 40
Cl. 18 (Necessary and Proper Clause) 41, 43
§ 9, Cl. 8 45
Art. II 3, 15, 34, 42, 43, 44, 45
§ 1 ..... 1, 5, 6
Cl. 2 45
Cls. 2-3 2
Cl. 7 45
§ 2:
Cl. 1 46
Cl. 2 (Appointments Clause) ..... *passim*
§3 (Take Care Clause) 1, 5, 6, 43, 47
§ 4 46
Art. III 10, 11, 15, 28, 43
§ 1 ..... 1, 23, 27
Art. IV, § 3, Cl. 2 40
Art. V 45
Amend. IV 11
Amend. V 11, 45
Amend. XII 2
Act of May 26, 1824, ch. 163, 4 Stat. 44 39
Act of Feb. 28, 1871, ch. 99, § 8, 16 Stat. 436 35
Act of Feb. 8, 1924, ch. 16, 43 Stat. 5-6 48
Act of Nov. 10, 1986, Pub. L. No. 99-646, § 69, 100 Stat. 3616 39
Classification Act of 1923, ch. 265, § 2, 42 Stat. 1488 27

Statutes, regulations and rule—Continued:	Page
Ethics in Government Act of 1978:	
28 U.S.C. 49	1, 12
28 U.S.C. 528	44
28 U.S.C. (& Supp. III) 591-598	1
28 U.S.C. (Supp. III) 591(a)	16
28 U.S.C. 592(a)(2)	16
28 U.S.C. 592(c)(1)	16
28 U.S.C. 593(a)	12
28 U.S.C. 593(b)	14, 15
28 U.S.C. 594(a)	12, 31
28 U.S.C. 594(c)	12
28 U.S.C. 594(d)	12, 13
28 U.S.C. 594(e)	14
28 U.S.C. 594(f)	13
28 U.S.C. 595(b)(2)	15
28 U.S.C. 596(a)(1)	13
28 U.S.C. 596(b)(2)	14
28 U.S.C. 597(a)	13
Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293	14
§ 2, 101 Stat. 1295 (to be codified at 28 U.S.C. 592(a)(2)(B))	16
§ 2, 101 Stat. 1305 (to be codified at 28 U.S.C. 596(a)(3))	15
Judiciary Act of 1789, ch. 20, 1 Stat. 73:	
§ 7, 1 Stat. 76	18
§ 28, 1 Stat. 87	39
§ 35, 1 Stat. 92	38
Rev. Stat. (1873 ed.):	
§ 1982	40
§ 1983	40
§§ 2011-2029	35
§ 2012	34
§ 2022	35
§ 2024	36
§ 2026	35
2 U.S.C. 437d(a)(6)	32
5 U.S.C. (& Supp. IV) App. at 987-993	47
7 U.S.C. 4a(c)	32
7 U.S.C. (& Supp. IV) 13a-1	32

Statutes, regulations and rule—Continued:	Page
8 U.S.C. (1934 ed.) 49	40
8 U.S.C. (1934 ed.) 50	40
12 U.S.C. 2	32-33
12 U.S.C. 242	33
12 U.S.C. (& Supp. IV) 1812	32-33
15 U.S.C. 41	33
15 U.S.C. (1940 ed.) 45	30
15 U.S.C. (1940 ed.) 45(b)	30
15 U.S.C. (1940 ed.) 45(c)	30
15 U.S.C. (1940 ed.) 46	30
15 U.S.C. (1940 ed.) 47	30
15 U.S.C. (1940 ed.) 50	30
15 U.S.C. 56(b)	32
15 U.S.C. 77t(b)	32
15 U.S.C. 78d(a)	33
15 U.S.C. 2053(a)	32
15 U.S.C. 2076(b)(7)(B)	32
18 U.S.C. 208	43
18 U.S.C. 287	37
25 U.S.C. 201	38
28 U.S.C. 546	39
28 U.S.C. 547	32
28 U.S.C. 631(a)	18
28 U.S.C. 671(a)	18
28 U.S.C. 711(a)	18
28 U.S.C. 751(a)	18
31 U.S.C. 3730(b)	37
31 U.S.C. 3730(b)(2)	38
31 U.S.C. 3730(b)(4)	38
42 U.S.C. 7171(i)	32
47 U.S.C. 154(c)	32
47 U.S.C. 401(c)	32
49 U.S.C. (& Supp. III) 11703	32
Exec. Order No. 11,222, 3 C.F.R. 306 (1964-1965 comp.)	44
28 C.F.R.:	
Pt. O:	
Section O.39	48
Pt. 45	44

Statutes, regulations and rule—Continued: Page

Fed. R. Civ. P. 4(c) 40

Miscellaneous:

1 Annals of Cong. (J. Gales ed. 1789):
p. 462 19
p. 499 7
p. 581 17
3 Annals of Cong. 963 (1793) 49
Baker, *The Proposed Judicially Appointed Independent Office of Public Attorney: Some Constitutional Objections and an Alternative*, 29 Sw. L.J. 671 (1975) 44
Comment, *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement*, 20 UCLA L. Rev. 778 (1973) 37
J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed. 1836):
Vol. 2 ..... 7, 45
Vol. 4 ..... 45, 46
1 *Encyclopaedia of the Social Sciences* (1930) 23-24
M. Farrand, *The Records of the Federal Convention of 1787* (1937):
Vol. 1 ..... 6, 21, 23
Vol. 2 ..... 2, 19, 20, 21, 27, 45, 46
44 Fed. Reg. 25837 (1979) 48
Frey & Geller, *Better Than Independent Counsels*, The Washington Post, Feb. 14, 1988 44
Hearings on the Investigation of Regulatory Commissions and Agencies Before the Special Comm. on Legislative Oversight of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess. (1958) 48-49
P. Hoffer & N. Hull, *Impeachment in America, 1635-1805* (1984) 46
H.R. Conf. Rep. 100-452, 100th Cong., 1st Sess. (1987) 13
H.R. Rep. 684, 29th Cong., 1st Sess. (1846) 49
H.R. Rep. 186, 44th Cong., 1st Sess. (1876) 49

Miscellaneous—Continued: Page

H.R. Rep. 218, 44th Cong., 2d Sess. (1877) 35
H.R. Rep. 3142, 49th Cong., 1st Sess. (1886) 49
H.R. Rep. 95-1307, 95th Cong., 2d Sess. (1978) 14, 44
H.R. Rep 100-316, 100th Cong., 1st Sess. (1987) 14
S. Johnson, *Dictionary of the English Language* (7th ed. 1785) 28
Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41 6
Model Penal Code (1985) 36
Note, *The History and Development of Qui Tam*, 1972 Wash. L.Q. 81 37
1 Op. Att'y Gen. 624 (1823) 8
2 Op. Att'y Gen. 482 (1831) 38
6 Op. Att'y Gen. 80 (1853) 40
Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. (1974) 12
Responses of the Presidents to Charges of Misconduct (C. Vann Woodward ed. 1974) 48, 49
S. Rep. 27, 69th Cong., 1st Sess. (1926) 49
S. Rep. 95-170, 95th Cong., 1st Sess. (1977) 10, 13, 14
S. Rep. 96-1015, 96th Cong., 2d Sess. (1980) 49
S. Rep. 97-496, 97th Cong., 2d Sess. (1982) 13, 44
2 H. Storing, *The Compleat Anti-Federalist* (1981) 22
J. Story, *Commentaries on the Constitution of the United States* (1987) 8, 22, 46, 47
Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984) 6, 8
C. Thach, *The Creation of the Presidency, 1775-1789* (1969) 6, 21
The Federalist (C. Rossiter ed. 1961):
No. 47 ..... 2, 18, 23, 28
No. 48 2
No. 51 21
No. 65 ..... 24, 46, 47

Miscellaneous—Continued: Page

No. 68 6
No. 69 ..... 21, 46
No. 70 7
No. 72 ..... 2, 8, 21
No. 74 45
No. 76 ..... 28, 46
No. 77 ..... 21, 46
No. 78 23
No. 81 ..... 27-28, 46
No. 84 46
L. White, *The Federalists: A Study in Administrative History* (1948) 39
1 J. Wilson, *Works, Lectures on Law* (1791) 8

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

INTEREST OF THE UNITED STATES

This case presents the question of the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. (& Supp. III) 49, 591-598. Those provisions require the Attorney General to seek, and direct a special division of an Article III court to appoint, an independent counsel to conduct certain criminal investigation and prosecutions, free of presidential superintendence. The interest of the United States in this case is in preserving an important part of the power and duty of the President to "take Care that the Laws be faithfully executed."

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution does not give the national government undifferentiated power, to be used by whatever officials and to whatever end might seem necessary and proper. Rather, it creates a government of limited and delegated powers, which are divided into " 'three defined categories, Legislative, Executive, and Judicial' " (*Bowsher* v. *Synar*, No. 85-1377 (July 7, 1986), slip op. 6, quoting *INS* v. *Chadha*, 462 U.S. 919, 951 (1983)) and which are assigned separately to three distinct Branches of government: "[a]ll legislative Powers" to the Congress (Art. I, § 1), "[t]he executive Power" to the President (Art. II, § 1), and "[t]he judicial Power" to the Supreme Court and "such inferior Courts" as Congress may establish (Art. III, § 1). The Constitution specifically charges the President to "take Care that the Laws be faithfully executed" (Art. II, § 3). The independent counsel statute creates an office that lies outside this constitutional scheme.[1]

[1] Contrary to appellant's argument (Br. 24-29), this Court is not foreclosed from reaching the question of the constitutionality

The tripartite structure is at "the heart of the Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 119 (1976). See, *e.g.*, *The Federalist No. 47*, at 301 (Madison) (C. Rossiter ed. 1961); *Id. No. 48*, at 308 (Madison); *Id. No. 72*, at 435 (Hamilton). "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Synar*, slip op. 14. They therefore made clear that the three Branches were to "be largely separate from one another" (*Buckley*, 424 U.S. at 120). Their objective, however, was not only "to 'diffus[e] power the better to secure liberty'" (*Snyar*, slip op. 6 (citation omitted)), but also to focus responsibility and accountability for the exercise of the powers of government. For that reason, the Constitution vests all executive power in "a single Person" (2 M. Farrand, *The Records of the Federal Convention of 1787*, at 171 (1937) (draft of Committee on Detail) (*Farrand*)) chosen by the people (Art. II, § 1, Cls. 2-3; Amend. XII), thus ensuring that a readily identifiable official could be held to account for its exercise.

---

of the independent counsel statute. We share appellant's concern, reflected in *Blair* v. *United States*, 250 U.S. 273 (1919), that grand jury proceedings generally not be subject to interruption by witnesses' legal challenges to subpoenas. In this case, however, appellant herself did not object to the interruption of grand jury proceedings that occurred when appellees responded to subpoenas by challenging her authority to proceed (J.S. App. 9a n.6). Because appellees have been held in civil contempt for their refusal to comply with the subpoenas, there is a case or controversy between appellant and appellees, and the question whether to consider appellees' challenge is a matter of prudence and sound judicial administration. In light of appellant's failure to object to resolution of the constitutional questions by the district court, the unique and fundamental character of appellees' challenge to the prosecutor's authority, and the purely legal nature of that challenge, it was proper for the court of appeals to address the important constitutional questions presented. Cf. *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967); *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967); *American Trucking Ass'ns, Inc.* v. *ICC*, 747 F.2d 787 (D.C. Cir. 1984). It is likewise proper for this Court to do so.

The independent counsel statute has the opposite purpose and effect. It seeks to insulate from accountability to any elected official what all agree is an important part of the executive power—the power to investigate and prosecute serious crimes allegedly committed by certain high government officials and campaign officials. It vests that power in an officer who in her appointment to office, conduct while in office, and duration in office is not accountable to the President or, through him, to the people. Each appointment of an independent counsel thus creates a separate and politically unaccountable mini-Executive Branch, of limited but important jurisdiction, that is essentially supreme in its sphere. The stated justification for the statute is that personal or political loyalties may prevent, or be perceived to prevent, the President and his subordinates from properly discharging their duties under the Constitution and laws. But the statute's solution to the important problem of misconduct by high officials is contrary to the text and structure of the Constitution: it diffuses and misplaces the responsibilities the Constitution assigns to the President, and the responsibilities it assigns to the Congress and the Judicial Branch as well.

By taking purely executive power from the President and giving it to an officer not accountable to the President, the statute contravenes Article II's vesting of the "executive Power" in the President, absolving the President of, and disabling him from carrying out, his duty to "take Care that the Laws be faithfully executed," including the duty to see that wrongdoing by high officials is investigated and prosecuted. By providing for judicial appointment of the independent counsel, a purely executive and nonsubordinate officer, the statute contravenes the Appointments Clause (Art. II, § 2, Cl. 2), absolving both the President and the Senate of their responsibilities for the selection of officers of the United States. By insulating the independent counsel from removal except for misconduct or incapacity, the statute contravenes established principles recognizing the authority of the President to remove officers who exercise purely executive power. By

creating a prosecutor independent of the President, the statute also absolves Congress of its special constitutional responsibility to scrutinize the actions of high government officials, including the President. And by handing off to the Judicial Branch the responsibility for appointing a prosecutor, defining her jurisdiction, and overseeing her performance, the statute threatens to squander that Branch's invaluable resources of objectivity and detachment from political processes.

The possibility of personal and political conflicts of interest does not justify this sort of patchwork improvement on the Constitution. Except for the President himself, any individual having a personal or political relationship with persons who are the subjects of an investigation or accusation is subject to personal disqualification under existing laws and regulations, and Congress has ample powers to take further steps to deal with such conflicts. Congress may, for example, provide for the appointment of a special prosecutor outside any existing department but still accountable to the President. And Congress may ensure a check on the President's selection of such a prosecutor in the manner the Framers specifically prescribed: by making the appointment subject to the advice and consent of the Senate.

Conflicts of interest on the part of the President himself are another matter entirely: the responsibility for investigating and prosecuting alleged offenses of high officials in the President's Administration must remain with the President himself, where the Constitution places it, and Congress and the people should hold him accountable for his fulfillment of that responsibility, as they plainly have on important occasions in the past. The Constitution itself makes the President *both* politically accountable for the conduct of the principal officers of the Executive Branch *and* responsible for investigating, removing, and prosecuting such officers for their offenses. The Constitution does not contemplate that the President may be "disqualified" because of an impermissible "conflict" between his political interest and his responsibility as Chief Executive. Any such "conflict" is intrinsic to the vesting of all executive power in an elected President.

The problem of suspected wrongdoing at the highest levels of the Executive Branch reveals no gap in the constitutional scheme. The tools supplied by the Constitution to deal with this problem—*e.g.*, dismissal by the President, criminal prosecution by regular or special prosecutors within the Executive Branch, congressional investigation, and impeachment and its threat—have been used with success throughout our history. And if elected officials and their appointees fail to use these tools to root out wrongdoing, the people have the ultimate capacity to discern and punish such derelictions. Ad hoc devices intended to give important parts of law enforcement to the politically unaccountable do not buttress the constitutional structure; they dilapidate it. In this respect, the independent counsel statute is another attempt—like those encountered in *Synar* (use of Comptroller General as budget control mechanism), *Chadha* (legislative veto), and *Buckley* (congressional appointment of Federal Election Commissioners)—to accomplish by extra-constitutional mechanisms what those entrusted with the offices and powers created by the Constitution are thought to lack the will to do.

ARGUMENT

I. THE INDEPENDENT COUNSEL STATUTE UNCONSTITUTIONALLY TAKES EXECUTIVE POWER FROM THE PRESIDENT

A. Article II, Section 1, of the Constitution declares: "The executive Power shall be vested in a President of the United States of America." Section 3 of the same Article then charges the President with the corresponding duty: "he shall take Care that the Laws be faithfully executed." The independent counsel statute violates the plain meaning of those words by taking an important part of the executive power, and of the concomitant duty to see to the faithful execution of the laws, away from the President and assigning it to a person unaccountable to the

President in her selection *and* her performance *and* her tenure. The statute vests executive power other than in the President, in direct contravention of Article II, Section 1's "grant of power" (*Myers* v. *United States*, 272 U.S. 52, 151 (1926)), and relieves the President of his duty and his ability to see to the faithful execution of the laws, in direct contravention of Article II, Section 3.

It is not an accident that the whole of the executive power is vested in the President: the purpose was to create a unitary, vigorous, and independent Executive responsible directly to the people. See J.S. App. 27a; C. Thach, *The Creation of the Presidency, 1775-1789*, at 70-75, 119-123, 140-160 (1969); *id.* at vii (introduction by Herbert Storing); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 599-605 (1984). The Framers repeatedly expressed the importance of accountability to the people for the exercise of executive power. See 1 *Farrand* 65-67, 71-74, 96-97, 109, 254, 266-267; *The Federalist No. 68*, at 411-414 (Hamilton). They also explained the importance of unity in the Executive as a structural principle, which they adopted in reaction to experience with divided executive responsibility under the Continental Congress and in the state governments,[2] and after rejecting several proposals that would have diffused executive power.[3] Placement of the executive power "in

[2] See Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 68-69 (describing the disorganization that plagued the Continental Congress's efforts to direct the American Revolution); C. Thach, *supra*, at 52-53 ("state experience * * * taught the value of integration" in the Executive); *id.* at 31-34, 41-42 (describing state experience with a divided executive); *id.* at 62 (Confederation experience prompted demands for "unitary departmental control and integration" in execution of laws); *id.* at 57-68 (describing Confederation experience).

[3] The Convention rejected Edmund Randolph's proposal that the Executive consist of three members drawn from separate regions of the country. 1 *Farrand* 66, 71-74, 88, 91-92, 97. It also turned down proposals for the President to have a Privy Council, consisting either of the Chief Justice and the heads of executive departments

a single hand," Hamilton explained, was an essential attribute of the energy that was "a leading character in the definition of good government" (*The Federalist No. 70*, at 423, 424). It was also necessary to ensure the responsibility and democratic accountability for the powers vested in the elected President, since an absence of unity would "deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power"—"the restraints of public opinion" and "the opportunity of discovering with facility and clearness the misconduct of the persons they trust" (*id.* at 428-429). See also 1 Annals of Cong. 499 (J. Gales ed. 1789) (Madison) (referring to the "great principle of unity and responsibility in the Executive department, which was intended for the security of liberty and the public good").

Explaining the importance of focused responsibility, Hamilton observed that the Executive's "unity may be destroyed * * * by vesting it ostensibly in one man, subject in whole or in part to the control and cooperation of others" (*The Federalist No. 70*, at 424). And James Wilson, later a Justice of this Court, explained to the Pennsylvania ratifying convention (2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (2d ed. 1836) (*Elliot's Debates*)):

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality; no appointment can take place without his nomination; and he is responsible for every nomination he makes.

(2 *id.* at 335-337) or of representatives of regions (*id.* at 533, 537, 542). The resolutions adopted to guide the Committee on Detail and that Committee's draft both expressly provided that the Executive was to consist of "a single Person" (*id.* at 132, 171).

Accord, 1 J. Wilson, *Works, Lectures on Law* 294-295 (1791); J. Story, *Commentaries on the Constitution of the United States* 520 (1987) (*Story*) (plurality in the Executive "diminishes the means, as well as the power, of fixing responsibility for bad measures upon the real authors").

The vesting of the executive power entirely in the President does not, of course, mean that the President must act personally in all matters, or that he alone decides how executive power shall be delegated. "[T]he President alone and unaided could not execute the laws" (*Myers*, 272 U.S. at 117), and the Constitution leaves Congress a wide discretion in structuring the government and in assigning particular functions to particular offices. But because the executive power, and the duty to take care that the laws be faithfully executed, are vested in the President alone, any officers who are to exercise that power must be his "subordinates" and "act for him under his direction" (*ibid.*).[4] As Hamilton explained, executive officers "ought to be considered as the assistants or deputies of the Chief Magistrate * * * and ought to be subject to his superintendence" (*The Federalist No. 72*, at 436). See *In re Neagle*, 135 U.S. 1, 64 (1890); *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 279-280 (1888).[5]

---

[4] The Senate cites (Br. 21 & n.29) an 1823 opinion of the Attorney General in which he explained that the Constitution does not impose on the President the duty to execute the laws personally (1 Op. Att'y Gen. 624, 624-626). The same opinion also makes clear that the Constitution "places the officers engaged in the execution of the laws under [the President's] general superintendence" and that, if the President is not satisfied with their conduct, he may take steps "to cause them to be displaced, prosecuted, or impeached" (*id.* at 625).

[5] The fact that Congress may assign *non*discretionary duties to particular executive officers, and that the President may not instruct those officers to countermand their statutory orders (see *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 610-613 (1838)), is of course fully consistent with the President's duty to "take Care * * *." See Strauss, *supra*, 84 Colum. L. Rev. at 607 (footnote

To say that every officer who does exercise executive power "ought to be subject to [the President's] superintendence" does not eliminate all congressional choice in the assignment of functions among the Executive, Judicial, and Legislative Branches. There are some activities of government—supervising the conduct of congressional elections is one example—that do not fall necessarily into only one of the three powers, and which Congress probably could assign to more than one of the three Branches.[6] And our argument in this case does not require that the President's power of "superintendence" entail, in every case, the power of appointment to office *and* plenary power of direction while in office *and* plenary power of removal from office, especially in the case of officers whose functions are not purely executive.[7] That issue is not in this case. What Congress may not do is to establish an Executive Branch office to carry out functions that *are* inescapably executive, but wholly eliminate presidential superintendence, providing for the office to be filled by a person who is not appointed by the President or his subordinates, not subject to their direc-

---

omitted) (the duty in *Kendall* "left no scope for judgment" and the decision accordingly "holds only that the President and other executive officials must act within the law").

[6] As Justice Stevens said in his concurring opinion in *Synar* (slip op. 14), "a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned."

[7] Thus, as we explain below (pp. 29-33) in discussing *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), whether the President must be able to remove at will the members, appointed by him with Senate consent, of independent agencies that perform "quasi-legislative" and "quasi-judicial" functions presents questions quite distinct from those presented in this case.

Moreover, the President's accountability for the exercise of discretionary executive power is of course not imperiled by the ordinary protections against removal from office enjoyed by federal employees in the civil service, who are so situated in the hierarchy of authority leading up to the President that their every exercise of discretionary power is subject to control by a superior in that hierarchy. See *United States* v. *Perkins*, 116 U.S. 483 (1886).

tion while in office, and not removable except for misconduct or incapacity.[8] As we now explain, that is precisely what Congress has done in the independent counsel statute.

B. 1. As appellant concedes (Br. 52), "criminal prosecution is indisputably an 'executive'—as opposed to a 'legislative' or 'judicial'—function." This Court has so ruled on numerous occasions. See, *e.g.*, *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985); *Buckley*, 424 U.S. at 138; *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928); *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922); *Wilcox* v. *Jackson*, 38 U.S. (13 Pet.) 498, 513 (1839).[9] See also S. Rep. 95-170, 95th Cong., 1st Sess. 5 (1977) ("The responsibility for law enforcement is placed upon the

[8] *Buckley*, 424 U.S. at 137-138, offers a close analogy. The members of the Federal Election Commission as then constituted were not appointed in accordance with the Appointments Clause. The Court therefore considered which of the Commission's powers could be exercised by commissioners not so appointed. The Court's answer was that certain powers "falling in the same general category as those powers which Congress might delegate to one of its own committees" could be exercised by the Commission, but other powers, notably the Commission's "enforcement power, exemplified by its discretionary power to seek judicial relief" (*id.* at 138), could not be so delegated, because "it is to the President, and not to the Congress, that the Constitution entrusts the responsibility 'to take Care that the Laws be faithfully executed'" (*ibid.* (citation omitted)).

[9] In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987), the Court ruled that a court may appoint an attorney for the special purpose of assisting it in punishing contempts. The Court viewed that power as an integral part of the inherent Article III authority to ensure respect for the courts (slip op. 7-12) and carefully distinguished the task of prosecuting crime generally. The Court explained that merely because contempt is a crime "does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the executive branch may engage. * * * [T]hese proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court." *Id.* at 11-12.

executive branch of the Federal Government."). The decision whether to bring a prosecution in a particular case has long been recognized to lie within the discretion of the Executive Branch and not to be subject to judicial control. See *Nixon*, 418 U.S. at 693; *United States* v. *Thompson*, 251 U.S. 407, 415 (1920); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1869); *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965); see also *Ullman* v. *United States*, 350 U.S. 422 (1956) (immunity decisions); *Ex parte United States*, 287 U.S. 241 (1932).[10]

The decisions of an independent counsel require the exercise of the sort of policy discretion that is the very essence of the execution of the laws. Cf. *Synar*, slip op. 16-17. A prosecutor must decide not only the strength of a particular case but also "the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Wayte* v. *United States*, 470 U.S. 598, 607 (1985). A prosecutor must decide what position to take on unresolved issues of law and how such positions would affect other litigating positions. See *United States* v. *Mendoza*, 464 U.S. 154, 160-161 (1984). Decisions whether to bring charges against a particular

[10] Judicial supervision of grand juries is wholly different. The grand jury, expressly referred to in the Fifth Amendment, has always been understood to be a distinctive institution, directly involving the people rather than an ordinary governmental office within one of the Branches; and limited judicial supervision of grand juries is considered an ancillary aspect of the Article III judicial power. See *United States* v. *Sells Eng'g, Inc.*, 463 U.S. 418, 423-424 (1983); *Brown* v. *United States*, 359 U.S. 41, 49 (1959). Even in that setting, courts have recognized that such supervision is constrained by separation-of-powers principles. *United States* v. *Gatto*, 763 F.2d 1040, 1046 (9th Cir. 1985); *United States* v. *Chanen*, 549 F.2d 1306, 1312 (9th Cir.), cert. denied, 434 U.S. 825 (1977). In any event, judicial supervision of grand juries involves no judicial role in the exercise of policy discretion. Nor is any involvement in prosecutors' policy decisions called for by the judicial role, expressly referred to in the Fourth Amendment, in making determinations of probable cause upon applications for warrants.

person, what charges to bring, and what sentences to recommend routinely involve value judgments about the seriousness of particular offenses. A prosecutor may also have to make policy decisions about whether a prosecution, or particular charges or information, should be pursued in light of the effect on matters such as national security, foreign policy, or economic policy. These and other discretionary policy judgments must be made at all stages of a prosecution, from the initiation of an investigation through the recommendation of a sentence. See Common Cause (CC) Br. 8.[11]

2. The independent counsel statute divests an important part of this power and responsibility for criminal law enforcement from the President and his subordinates, and transfers it to a person who is selected and appointed by a court and who is not accountable to the President for the decisions she makes once in office. The statute provides that an "appropriate" independent counsel is to be selected and appointed by a Special Division of the District of Columbia Circuit. 28 U.S.C. 49, 593(a). The independent counsel is then vested with "all investigative and prosecutorial functions and powers" of the Attorney General (except for certain wiretap-approval authority), including the power to appoint staff and to demand assistance from the Department of Justice. 28 U.S.C. 594(a), (c), and (d). Once a matter is in the hands of an independent counsel, the Department of Justice is directed to "suspend all investigations and proceedings regarding such matter," except insofar as the independent counsel directs. 28 U.S.C. 597(a), 594(d).

[11] For example, as Professor Cox testified, President Theodore Roosevelt decided not to prosecute United States Steel Corporation for an antitrust violation because such an action might have impaired business confidence during the economic recovery following the financial panic of 1907. *Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 202 (1974). The current Iran/Contra investigation involves a host of foreign-relations and national-intelligence issues and has already required investigation in and contact with several foreign nations, including Israel. See also *United States* v. *Deaver*, No. 87-096 (D.D.C. June 22, 1987) (subpoena of Canadian ambassador); J.S. App. 57a-58a.

In exercising her authority, the independent counsel is supposed to be "truly independent" (S. Rep. 95-170, *supra*, at 70). While she is directed to follow Department of Justice policy generally, she is excused from doing so "where not possible" (28 U.S.C. 594(f)), and no one may second-guess her discretionary decisions on that score.[12] She may be removed, except by impeachment, only for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties" (28 U.S.C. 596(a)(1)), a standard that Congress intended to permit removal only for "misconduct" (H.R. Conf. Rep. 100-452, 100th Cong., 1st Sess. 37 (1987)). All parties agree that those provisions were designed to ensure independence from the entire Executive Branch, including the President. See *id.* at 37 ("[t]he 'good cause' removal standard is at the heart of the statutory mechanisms protecting the independent counsel's ability to act independently of the President's direct control"); S. Rep. 95-170, *supra*, at 65-66 ("[t]he entire purpose of appointing * * * [an independent counsel] is to get someone who is independent * * * from the President and the Attorney General"); S. Rep. 97-496, 97th Cong., 2d Sess. 2 (1982).

The statutory text and legislative history thus make clear that the independent counsel is in no sense a sub-

[12] The Senate Committee indicated in 1982 that compliance with Justice Department policies was only a "goal" (S. Rep. 97-496, 97th Cong., 2d Sess. 16) and that the independent counsel "should be guided by his perception of fundamental fairness and of what is required to conduct the investigation conscientiously" (*ibid.*). The Committee further stated that the statute "should not be interpreted to mean that failure of the [independent counsel] to follow Departmental policies would constitute grounds for removal * * *. [This] would seriously compromise the [counsel's] independence" (*ibid.*). Contra, App't Br. 58; Sen. Br. 25 n.34; CC Br. 9.

ordinate of or accountable to the President. It is the court that determines which individual, with what experience, outlook, and judgment, would be an "appropriate" person to exercise the power of criminal prosecution. Once appointed, the independent counsel is essentially supreme in her sphere. And to whatever extent she is not supreme, an independent counsel is in significant respects subordinate and accountable more to the Judicial Branch than to the President.

The independent counsel owes her selection and appointment to the Special Division in the first place. She also owes her grant of jurisdiction to the Special Division: the Division is not bound by the Attorney General's proposal for the scope of the independent counsel's authority, but defines her jurisdiction itself. 28 U.S.C. 593(b); see S. Rep. 95-170, *supra*, at 64.[13] In addition, the Special Division has the authority to terminate an appointment on its own motion on the ground that the investigation is fully or substantially complete (28 U.S.C. 596 (b)(2)), a provision that is "intended to deal with situations where [an independent counsel] is attempting to prolong his office beyond the time it is really needed" (H.R. Rep. 95-1307, 95th Cong., 2d Sess. 11 (1978)).

[13] The Special Division exercised that authority in the case for which amicus Walsh was appointed: after receiving a letter from several Members of Congress, it defined his jurisdiction to include more events and persons than those included in the Attorney General's application. See *In re North*, No. 86-6 (D.C. Cir. Indep. Counsel Spec. Div. (Order of Dec. 19, 1986)); *In re Sealed Case*, 829 F.2d 50, 65 n.3 (D.C. Cir. 1987) (Williams, J., concurring in part and dissenting in part), cert. denied, No. 87-869 (Jan. 19, 1988).

Under 28 U.S.C. 594(e), an independent counsel "may ask the Attorney General or the division of the court to refer matters related" to her original jurisdiction. The Special Division ruled in *In re Olson*, 818 F.2d 34, 48 (1987), that the division could not grant such a request after the Attorney General had denied it. Whether the independent counsel could bypass the Attorney General altogether was not discussed. In the 1987 reauthorization, Pub. L. No. 100-191, 101 Stat. 1293, Congress made clear that such a bypass is authorized. See H.R. Rep. 100-316, 100th Cong., 1st Sess. 28-29 (1987).

Also, before terminating her office, the independent counsel must file a report with the Special Division setting forth "fully and completely" the work of her office and the reasons for any decision not to prosecute (28 U.S.C. 595(b)(2)). Finally, if an independent counsel is removed from office by the Attorney General, she may obtain review of the removal, and possibly reinstatement, from a federal district court (§ 2, 101 Stat. 1305, to be codified at 28 U.S.C. 596(a)(3)).

This close relationship to the Judicial Branch highlights the absence of accountability to the President. Moreover, the degree of subservience to the Judicial Branch hardly comports with the prohibition on even modest inter-Branch encroachments that is established by *Synar*, *Buckley*, and *Myers*. And to the extent that the various functions assigned to the courts create, in practice, a "superintending" relationship between them and the independent counsels, that function is inconsistent with the long-standing restriction of Article III courts to the deciding of cases and controversies and various ancillary functions. See pp. 23-24, *infra*; J.S. App. 74a-87a; *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, 85 (1970) (court may keep its "own house in order").

3. Appellant and her amici argue (*e.g.*, App't Br. 18-19, 48; Walsh Br. 12, 24) that the independent counsel statute is nevertheless rendered valid by the fact that no appointment can be made unless the Attorney General requests one (28 U.S.C. 593(b)), apparently suggesting some sort of waiver of Executive Branch rights. But apart from the fact that Article II does not allow the President to waive either his executive power or his duty to take care that the laws are faithfully executed,[14]

[14] Cf. *Chadha*, 462 U.S. at 942 n.13. The Constitution plainly would not allow the President to give an Article III court the power to appoint a special Secretary of State who would thereafter independently conduct one section of the Nation's foreign affairs; neither does it allow the Attorney General to give irretrievably away the President's responsibility for the discretionary law en-

there is no voluntary waiver under the relevant provision of the Ethics in Government Act. Contrary to the suggestion of appellant (Br. 18-19) and some of her amici (*e.g.*, H.R. Spkr. Br. 14; ABA Br. 11), the Attorney General's decision to request an appointment in a case like this one, although not subject to judicial review (*Nathan* v. *Smith*, 737 F.2d 1069 (D.C. Cir. 1984)), is mandated by statute. In specified circumstances, the Attorney General "shall conduct" a preliminary investigation (28 U.S.C. (Supp. III) 591(a)), and he "shall apply" for an appointment if the standard for doing so is met—if he finds "reasonable grounds to believe that further investigation or prosecution is warranted" or he cannot find the contrary after a specified time (28 U.S.C. 592(c)(1)).[15] These legal obligations could be viewed as discretionary only on the cynical view that a duty that is not judicially enforceable is no duty at all.

II. THE INDEPENDENT COUNSEL STATUTE VIOLATES THE APPOINTMENTS CLAUSE

The Appointments Clause of the Constitution (Art. II, § 2, Cl. 2) is not a mere matter of "etiquette or protocol" (*Buckley*, 424 U.S. at 125). It is an essential aspect of the separation of powers that is "woven into the [Constitution]" (*id.* at 124). It *enables* the President "to take Care that the Laws be faithfully executed" through the appointment, for which he is politically accountable, of the officers who help him execute the laws.[16]

---

forcement decisions (regarding, *e.g.*, charges, grants of immunity, pleas) made by the independent counsel.

[15] In addition, the Attorney General must base his decision on limited information, because he is expressly forbidden to use compulsory grand jury process or to issue subpoenas in conducting his preliminary investigations. 28 U.S.C. 592(a)(2). Under the 1987 reauthorization, he is also barred from rejecting referral based on the target's state of mind. § 2, 101 Stat. 1295, to be codified at 28 U.S.C. 592(a)(2)(B).

[16] Madison noted: "[i]f there is a principle in our Constitution * * * more sacred than another, it is that which separates the

As the court of appeals ruled, the independent counsel statute contravenes the Appointments Clause in two ways. First, an officer who exercises prosecutorial power in an important class of cases, and who is not subordinate to any superior in the exercise of that power, cannot be an "inferior" officer and hence must be appointed by the President with the advice and consent of the Senate. Second, even inferior officers who exercise executive power must be appointed by the President or by a head of department appointed by him. These two points are closely related aspects of a single larger point: the duty of the President to "take Care" means that *he*, with the help of the Senate in certain cases and acting on his own or through his heads of departments in others, is responsible and accountable to the people for selecting those persons who will exercise significant authority in executing the law. The Appointments Clause was meant to implement that presidential responsibility, not to frag-ment it.

A. The Appointments Clause Does Not Permit Congress to Vest the Appointment of Executive Officers in the Courts of Law

The Appointments Clause, which deals with appointments of both Executive and Judicial Branch officers, says that Congress may vest the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." But only a reading blind to the constitutional context would allow Congress to vest the appointment of *any* inferior officer in *any* of those authorities. As this Court said in *Myers*, 272 U.S. at 117, and repeated in *Buckley*, 424 U.S. at 135:

> "[T]he President alone and unaided could not execute the laws. He must execute them by the assist-

---

Legislative, Executive, and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices." 1 Annals of Cong. 581.

> ance of subordinates. * * * As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws."

The essential role of appointments in the President's fulfillment of his constitutional duties thus compels the obvious alternative reading of the Appointments Clause—that Congress could empower the President or heads of executive departments to appoint inferior executive officers, while the courts of law could be authorized to appoint inferior judicial officers. That reading is also compelled by the history of the Clause.[17]

1. The reference to "Courts of Law" in the Appointments Clause is what permits Congress to authorize the courts to appoint their own inferior officers, as they have been authorized to do with the clerks of court since 1789. See Judiciary Act of 1789, ch. 20, § 7, 1 Stat. 76; *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 257-258 (1839); 28 U.S.C. 671(a), 711(a), 751(a); see also 28 U.S.C. 631(a) (court appointment of magistrates). To read the reference as also allowing judicial appointment of executive officers would run counter to the structure of the Constitution as a whole and of the Clause in particular. The separation of powers is so fundamental to the constitutional plan (see *The Federalist No. 47* (Madison)) that the Appointments Clause should not be construed to permit one Branch to play a formal role in the selection or removal of the officers of another Branch that the Constitution does not explicitly authorize. See

[17] Judge J. Skelly Wright rejected the contrary reading of the Appointments Clause in his dissent in *Hobson* v. *Hansen*, 265 F. Supp. 902, 921 (D.D.C. 1967): "Its language very naturally admits the common-sense reading that courts of law and the other listed offices were meant to appoint only those officers 'inferior' to them * * *. And the narrower reading harmonizes with the most apparent purpose of Article II: to let Congress clothe Secretaries and courts with the necessary authority for filling vacancies in their own staffs."

Synar, slip op. 6-8; 1 Annals of Cong. 462 (Madison's argument for not extending the Senate's advice-and-consent role to removals); *Myers*, 272 U.S. at 122-123; cf. *Buckley*, 424 U.S. at 127; *Chadha*, 462 U.S. at 955-956. Moreover, the Clause itself is written to establish presidential appointment, with Senate consent, as the general rule—applicable to appointment of not only the Justices of this Court and "Ambassadors, other public Ministers and Consuls" but also "all other Officers of the United States, whose Appointments are not herein otherwise provided for" (Art. II, § 2, Cl. 2). This general rule emphatically affirms the principle of presidential responsibility for the appointment of every officer of the Executive Branch other than the President himself and the Vice President. The inferior officer portion of the Appointments Clause, as a subsidiary clause addressing matters of detail, should not be read to impair that fundamental principle.

2. The history of the Appointments Clause belies the notion that the inferior officer portion was intended to do anything so extraordinary as allow for judicial appointment of executive officers. That portion of the Clause was added at the end of the Constitutional Convention and with little discussion. After much debate about the mode of appointments generally, the Committee on Style reported on September 12, 1787, what is now the first portion of the Clause (2 *Farrand* 599), which provides for presidential appointment and Senate confirmation of all officers and which, of course, would not allow courts to appoint executive officers. On September 15, 1787, the final working day of the Convention, the inferior officer provision was added (*id.* at 627-628) as one of a number of rapidly considered changes in the document (*id.* at 621-633).

The origins of this last-minute addition suggest a modest objective. Earlier, George Mason had complained that requiring Senate confirmation of all appointments, even of the "smallest" offices, would be "unwieldy [and] expensive" (2 *Farrand* 537). Rufus King had responded

that he "did not suppose it was meant that all the minute officers were to be appointed by the Senate, or any other original source, but *by the higher officers of the departments to which they belong*" (*id.* at 539 (emphasis added)). On September 15, Gouverneur Morris made the proposal to add the inferior officer clause, without explanation but presumably in order to resolve any uncertainty on this point (*id.* at 627). Like King before him, Madison suggested the addition might be unnecessary: "It does not go far enough if it be necessary at all—Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices" (*ibid.*). Morris responded that "[t]here is no necessity" for going even further, because "Blank Commissions can be sent" (presumably by the President or department head) (*ibid.*). After the proposal was initially rejected by an equally divided Convention (*id.* at 627-628), "[i]t was urged that it be put a second time, some such provision being too necessary, to be omitted"; the proposal was then adopted (*ibid.*). Nothing in this history suggests any intent except to relieve the Senate and even the President of the burden of appointing lesser officers; certainly this history does not remotely suggest an intent to permit the Judicial Branch to appoint Executive Branch officers, in derogation of the responsibility of *both* of the political Branches.

The discussion of the history of the Clause by amicus Senate (Br. 32-37) confirms this conclusion. While, from the beginning of the Convention, "[t]he matter of the appointment of officers of the new Federal Government was repeatedly debated" (*Buckley*, 424 U.S. at 271 (White, J., concurring in part and dissenting in part)), the debate focused on who should appoint the Judiciary and Ambassadors. The question of who should appoint the members of the unelected Branch plainly presented a special problem. And the debate over who should appoint Ambassadors (and other foreign ministers) was part of a larger debate over the Senate's role in foreign affairs; that debate was itself not resolved until the end

of the Convention, when the Framers settled on appointment-confirmation and treaty-ratification roles for the Senate (Art. II, § 2, Cl. 2), roles smaller than the more prominent role in foreign affairs (making treaties and appointing Ambassadors) the Convention had previously considered for the Senate.[18] In all the discussion, however, no one ever suggested that courts might be allowed to appoint executive officers. Nor did the Convention ever consider adopting any proposal that would have vested the power to appoint executive officers (other than foreign ministers) anywhere but in the Executive Branch itself. Indeed, from Madison's resolution of June 1 (1 *Farrand* 67), through Resolution 9 of the Committee on the Whole of June 13 (*id.* at 236), through the draft of the Committee on Detail of August 6 (2 *Farrand* 185), and the report of the Committee on Style of September 12 (*id.* at 599), the working documents of the Convention expressly provided for executive appointment of all executive officers (excepting foreign ministers).

3. The early post-Convention historical evidence of the Framers' intent confirms that the Appointments Clause was not meant to authorize judicial appointment of executive officers. Madison, in *The Federalist No. 51* (at 321), stated one basic principle: "each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others." Hamilton, in *The Federalist No. 72* (at 435-436), stated the correlative principle: executive officers "ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account they ought to derive their offices from his appointment." [19]

---

[18] 2 *Farrand* 183 (report of Committee on Detail); *id.* at 498; see C. Thach, *supra*, at 114-115, 127-130, 134-138.

[19] In *The Federalist No. 69* (at 421-422) and *The Federalist No. 77* (at 460-462), Hamilton objected to the secrecy and absence of personal responsibility where appointment is vested in a small council. The provision for appointment of executive officers by the

The "Federal Framer" explained during the ratification debates that "judges, and principal officers in the departments will be well informed men in their respective branches of business; that they will, from experience, be best informed as to fill inferior offices in them; that they will feel themselves responsible for the execution of their several branches of business, and for the conduct of the officers they may appoint therein." 2 H. Storing, *The Compleat Anti-Federalist* 308 (1981). Justice Story's discussion of the Appointments Clause in his 1833 commentary on the Constitution likewise contains no suggestion that he believed the Clause could be used to support such appointments (*Story* 563-567).[20] In *Ex parte Hennen*, 38 U.S. (13 Pet.) at 257-258, this Court explained: "The appointing power here designated, in the latter part of the [Clause], was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged." None of these discussions of the inferior officer clause, nor any other explanation that appellant and her amici have unearthed from the period, states anyone's

---

three-member Special Division of the District of Columbia Circuit, after deliberations, raises the very concerns Hamilton identified. Although multi-member "Courts of Law" commonly appoint their own clerks and other officers, the appointing authority in that situation is the same as that to which the officer reports.

[20] The contrary suggestion of amicus Common Cause (Br. 25) is incorrect. Justice Story's discussion of the "discretion" of Congress states nothing more than what appears from the text of the Appointments Clause: that Congress has discretion, for inferior officers, to choose not to require presidential nomination with Senate confirmation but instead to rely on the second portion of the Clause. Justice Story's discussion does not state that Congress has discretion to vest appointment of executive officers in the courts. Indeed, in explaining the virtues of this discretion, Justice Story stated: "In one age the appointment might be most proper in the president; and in another age, in a department" (*Story* 566). He omitted any reference to the third of the appointing authorities mentioned in the inferior officer portion of the Clause, viz., the courts.

belief that the Clause authorizes judicial appointment of executive officers.

4. The Framers' commitment to an independent judiciary, expressed in the constitutional protection of tenure during good behavior (Art. III, § 1), further demonstrates the anomalous nature of a reading of the Appointments Clause that would permit judicial appointment of executive officers. Beginning in 1792, this Court and its members have steadfastly rejected attempts to assign to the courts "executive or administrative duties of a nonjudicial nature" (*Buckley*, 424 U.S. at 123). See, *e.g.*, *Muskrat* v. *United States*, 219 U.S. 346 (1911); *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1851); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1791).[21] In this, the Court has accurately reflected the Framers' vital concern that the judiciary remain independent from the other Branches. See, *e.g.*, 1 *Farrand* 98-99 (rejecting judicial participation in Council of Revision); 2 *id.* at 298; *The Federalist No. 47*, at 302 (Madison) (quoting Montesquieu: "'[t]here can be no liberty' * * * 'if the power of judging be not separated from the legislative and executive powers'"); *The Federalist No. 78*, at 466 (Hamilton) (same). The power to select executive officers—particularly, those officers who are authorized to investigate and prosecute politically sensitive crimes—not only intrudes upon the President's responsibilities, but might also, as then-Professor Frankfurter said of the courts giving advisory opinions, "involve the judges too intimately in the process of policy and thereby weaken confidence in the disinterestedness of their judicatory functions." 1 *Encyclo-*

---

[21] A different question is presented by the voluntary assumption of certain duties by individual judges, as opposed to the courts themselves, at the behest of Congress or the Executive. The precedent for such practices includes Chief Justice Jay's service as Ambassador to England (while he served as Chief Justice) and Justice Jackson's service at the Nuremberg War Crimes Trials. See *In re President's Comm'n on Organized Crime (Subpoena of Scarfo)*, 783 F.2d 370, 377-378 (3d Cir. 1986).

paedia of the Social Sciences 478 (1980). Judicial power to appoint executive officers would thus stand in stark contrast to the Framers' vision of an independent judiciary, and that power should not be inferred in the absence of any evidence that such power was intended.

B. An Officer Who Exercises Prosecutorial Power, and Who is not Subordinate to Anyone in the Exercise of That Power, is not an "Inferior" Officer

The Appointments Clause requires presidential appointment and Senate confirmation of all except "inferior Officers." That requirement was intended to ensure accountability to the people—through both political Branches—for the appointment of those officers of the United States who are vested with primary responsibility for exercising the executive and judicial powers and thereby affecting the lives, liberty, and property of the people. The independent counsel statute violates that requirement because it vests complete and final authority to exercise the governmental power that most dramatically affects people—the power to bring a criminal prosecution—in a person who is not accountable to the people through either political Branch. Compare *The Federalist No. 65*, at 398 (Hamilton). The various interpretations of the term "inferior" advanced by appellant and her amici fail to come to grips with this fundamental defect.

1. Appellant first proposes (Br. 31-32) that all officers except those expressly named in the first portion of the Appointments Clause—Supreme Court Justices, ambassadors, and other public ministers and consuls—are inferior officers, but that proposal encounters a sea of troubles. First, it ascribes no sensible meaning at all to the word "inferior": for example, it makes the Secretary of State, who is not named, "inferior" to the ambassadors who report to him. Second, it would render department heads inferior officers, contrary to Congress's consistent practice and the First Congress's specific view of the matter (J.S. App. 12a n.8). Third, it would apparently allow Congress to vest in a single department head the authority to appoint all of the other department heads in the President's Branch—and in a single court all federal court judges except the Justices of this Court. There is no indication in the history of the inferior officer portion of the Clause that this last-minute addition was intended to displace the carefully worked-out provision for presidential nomination and Senate confirmation of the principal officers of the government.

2. Amicus Walsh seeks to avoid those difficulties by suggesting (Br. 10) that an inferior officer is any officer not "'specially mentioned'" (quoting *United States* v. *Germaine*, 99 U.S. 508, 510 (1879)) in the Clause as a whole, *i.e.*, all officers except Justices and ambassadors, etc., to which Amicus Walsh adds (*ibid.* (footnote omitted)) "'those officers in whom respectively the power of appointment may be vested—the President, the courts of law, and the heads of departments.' *Collins v. United States*, 14 Ct. Cl. 568, 574 (1879)." This view seeks to establish a different "bright line" (Walsh Br. 12) that avoids the grosser anomalies of appellant's initial proposal. But the Walsh proposal uses the text merely for convenience—and imprecisely at that—while ignoring its purpose.

Nothing in the Clause or the history of its drafting suggests that the expression "inferior Officers" was supposed to mean precisely all those not named in either the first or second portion of the Clause. The purpose of the second portion of the Clause was to designate permissible appointing authorities for certain subsidiary officers, not to list "specially mentioned" officers requiring presidential nomination and Senate confirmation. Indeed, amicus Walsh's ingenious proposal could work only by ignoring the difference between "*Courts of Law*," which are authorized to be given appointing authority, and federal *judges*, who (except for the Justices of this Court) are not specially mentioned in the Appointments Clause at all. For this reason, contrary to the statements of amicus Walsh and the *Collins* court (Br. 10),

individual federal judges may not be granted authority to appoint officers (though they may hire employees). Conversely, federal judges themselves are principal officers who must be appointed by the President with Senate confirmation; but the reason is not that they are specially mentioned, which (except for Justices of this Court) is not the case, but that they have tenure protection and are not subordinate or accountable to anyone in the performance of their duties, although the decisions of the courts on which they sit are reviewable. *Hennen*, 38 U.S. (13 Pet.) at 258; *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 59 n.10 (1982) (plurality). Appellant likewise has tenure protection and is not subordinate.

3. Appellant offers (Br. 33-35) yet another reading of the term "inferior Officers," which would include those of lesser "rank," "status," or "importance"—to be determined by examining their compensation, the scope of their duties, and their tenure, but *not* their place in the decision-making hierarchy. As amicus Walsh points out (Br. 12 (citation omitted)), this proposed test is "fuzzy," "amorphous," and "vague" and employs "'criteria of decision that necessar[il]y escap[e] the judicial grasp.'" Also, if an officer wields final governmental authority and is essentially supreme in her sphere, it is at the very least awkward to say that that officer is "inferior" just because her job is of limited scope and duration (perhaps even limited to a single case). Certainly as far as the people affected by the exercise of her power are concerned, she is not inferior in any meaningful sense. Moreover, appellant's test would, for appointment purposes, allow Congress to shatter the Executive Branch into a thousand small offices, each of limited scope (and perhaps short term and relatively low pay), and provide that each would be filled without presidential nomination and Senate consent. This is not the way the Framers intended the Executive Branch to be formed.

4. The root difficulty with all these proposals is that their objective is to make it possible for an officer to be

"inferior" without being subordinate to any "superior" in the exercise of her powers. Though subordinacy is not a sufficient condition to establish that one is an "inferior officer," it surely is a necessary condition. A person who exercises sufficient governmental authority to be an "officer" (see *Buckley*, 424 U.S. at 126-127) and who is supreme in her sphere cannot in fairness or ordinary usage be described as an "inferior officer." [22]

That subordinacy is a necessary condition for inferiority within the meaning of the Appointments Clause is indicated by this Court's repeated references to subordinacy in speaking of "inferior Officers." See *Nixon*, 418 U.S. at 694; *United States* v. *Eaton*, 169 U.S. 331, 343 (1898); *Germaine*, 99 U.S. at 511; *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 392-395 (1868); see also *Collins* v. *United States*, 14 Ct. Cl. 568, 574 (1879). It is also confirmed by the Constitution's authorization to create "inferior Courts" (Art. III, § 1), which was almost certainly understood to contemplate a closely related sort of subordinacy—*i.e.*, that their decisions would be subject to review by this Court (with "Exceptions"). Hamilton, in *The Federalist No. 81*, twice described the "inferior Courts" as "subordinate" to the Supreme Court

---

[22] In *United States* v. *Eaton*, 169 U.S. 331 (1898), the Secretary of State's temporary appointment of a vice-consul as Consul was upheld under the inferior officer portion of the Appointments Clause (even though "Consuls" are listed in the first portion of the Clause). The vice-consul was a subordinate officer. *Eaton* further suggests, by its reference to the temporary and emergency nature of the appointment, that subordinacy is only a necessary, and not always a sufficient, condition of status as an inferior officer. See also 2 *Farrand* 627 (Madison's reference to "Superior Officers below Heads of Departments"). Similarly, a department head would be structurally subordinate to the President, but he likely would be deemed to have the status and responsibilities of a principal officer, not only for historical reasons but also because he (rather than the President personally) is vested with final statutory authority over all matters within his department. Cf. Classification Act of 1923, ch. 265, § 2, 42 Stat. 1488 ("'the head of the department' means the officer or group of officers in the department who are not subordinate or responsible to any other officer of the department").

(*id.* at 485 n.*, 490). There is no reason to think the Framers used a different concept in the Appointments Clause from what they used in Article III.[23]

Taken together, appellant's contentions that an officer exercising discretionary executive power can be inferior without being subordinate, and can be appointed by a court of law, would rend the constitutional design. The Framers deliberately provided for presidential nomination with the safeguard of Senate confirmation as the general rule because they believed that method of appointment would help ensure responsible and politically accountable selection of those officers with primary authority in the administration of the laws. See *The Federalist No. 76*, at 457 (Hamilton). It would seriously undermine this judgment to permit Congress to avoid this mechanism by providing, as Congress has done in the independent counsel statute, for judicial appointment of an officer who, once appointed, would not be subordinate to any other executive officer, including the President, and hence would have the sort of final decision-making authority that renders presidential nomination and Senate confirmation most important.[24] An independent counsel has a truly separate fiefdom that is autonomous in its congressionally assigned sphere and that displaces the Branch headed by the President. She is in no sense "inferior" even to the President.

[23] Dr. Samuel Johnson, in his *Dictionary of the English Language* (7th ed. 1785), defined "inferiour" to mean (1) "[l]ower in place," (2) "[l]ower in station or rank of life: correlative to *superiour*," (3) "[l]ower in value or excellency," and (4) "[s]ubordinate." Contrary to the suggestion of appellant (Br. 35) and her amici (*e.g.*, CC Br. 25; Walsh Br. 13-14 n.14), we fail to see how that definition in any way undermines the hierarchical reading of the word "inferior" in the context of a constitutional provision concerned with governmental structure.

[24] That the Appointments Clause singles out Justices and various foreign ministers reflects this concern. Justices, once appointed, serve during good behavior, and foreign ministers, in the Eighteenth Century, had to carry out much of their work without means of quick contact with the government at home. Responsible appointment is in both cases especially important.

III. THE LIMITATIONS ON THE REMOVAL OF THE INDEPENDENT COUNSEL ARE INCONSISTENT WITH THIS COURT'S DECISIONS IN *MYERS*, *HUMPHREY'S EXECUTOR*, AND *WIENER*

Even if the independent counsel were properly appointed, it would not be permissible to limit so severely the President's power to remove her, denying that power altogether except for misconduct or incapacity. The duties of an independent counsel are purely executive in nature, and they therefore can be performed only by an officer who is accountable to the President. Whatever limits Congress may constitutionally impose on the President's various means of holding other officers to account, it may not deny his power to remove purely executive officers like an independent counsel.

A. This Court said in *Myers* that the Constitution confers on the President the unrestricted power to remove officers who were appointed by him with the advice and consent of the Senate and who carry out his responsibility for the faithful execution of the laws. The Court regarded this power of removal as an element of the "executive Power" that is essential to the President's fulfillment of his obligation to take care that the laws be faithfully executed. 272 U.S. at 162-164, 177.

In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court, while not questioning the result in *Myers*, held that the Constitution does not bar Congress from imposing limitations on the President's ability to remove a member of a commission (the Federal Trade Commission) that was charged by Congress with the exercise of certain "quasi-judicial" and "quasi-legislative" functions (295 U.S. at 628-629).[25] After it "carefully

[25] The FTC's functions that the Court described as "quasi-legislative" or "quasi-judicial" were quite limited. In particular, they did not include rulemaking power, as the FTC did not claim such authority until 1962. See *National Petroleum Refiners Ass'n* v.

emphasized" (*Buckley*, 424 U.S. at 133, citing 295 U.S. at 625-626) that the Commissioner was appointed by the President with Senate consent, the Court reasoned that Congress has the authority to create such bodies and to require them to act independently of executive control in the discharge of their duties, and that this authority "includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime" (*id.* at 629). The Court stressed its view that the FTC was "wholly disconnected [with] the executive department" (*id.* at 630) and "exercise[d] no part of the executive power vested by the Constitution in the President" (*id.* at 628).[26] The Court expressly did not disturb the decision in *Myers* insofar as it sustained the President's "illimitable power" (*id.* at 627- 629) to remove "purely

---

FTC, 482 F.2d 672, 693 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974); *Synar* v. *United States*, 626 F. Supp. 1374, 1397 n.24 (D.D.C. 1986) (three-judge court), aff'd, *Bowsher* v. *Synar*, *supra*. The FTC's functions at the time included the conduct of investigations on behalf of Congress (see 295 U.S. at 621, 628), individual adjudications (see *id.* at 620-621, 624, 628, 629), and the performance of duties as a master in chancery (see *id.* at 621, 628, 630). See 15 U.S.C. (1940 ed.) 45, 46, 47.

[26] Amicus Walsh suggests (Br. 25) that the FTC Commissioners did exercise executive power, but that suggestion rests on a misleading description of the powers of the FTC Commissioners at the time of *Humphrey's Executor*. Aside from "investigating antitrust violations," which obviously may be a legislative function, the Commissioners, amicus Walsh states, were charged with "filing complaints stating the charges, and going to court to enforce cease-and-desist orders." To the extent that that language is meant to suggest that the FTC could initiate actions in court, the suggestion is false. The FTC could file only *administrative* complaints, in order to initiate its own internal proceedings (15 U.S.C. (1940 ed.) 45 (b)); and it could "go[] to court to enforce cease-and-desist orders" only by being named as *a defendant* in a judicial challenge brought by a party subject to such an order (15 U.S.C. (1940 ed.) 45(c)). The FTC statute provided for initiation of a court action to enforce an order of the Commission only by "the Attorney General of the United States, at the request of the commission" (15 U.S.C. (1940 ed.) 50).

executive" officers (*id.* at 631, 632), such as the postmaster in *Myers*, who was "an executive officer restricted to the performance of executive functions" (*id.* at 627).

The Court reached a similar result in *Wiener* v. *United States*, 357 U.S. 349 (1958), which also involved officers appointed by the President with Senate consent. Noting that *Humphrey's Executor* had disapproved the broad dicta in *Myers* concerning the constitutional power of the President to remove members of "quasi-judicial" bodies (357 U.S. at 352), the Court held that Congress likewise could limit the power of the President to remove members of the War Claims Commission, in view of the "intrinsic judicial character" of the Commission's duties (*id.* at 355). As in *Humphrey's Executor*, the Court expressly did not disturb the decision in *Myers* as regards the President's "illimitable" power to remove " 'all purely executive officers' " (*id.* at 352 (quoting 295 U.S. at 626-627)).

B. The independent counsel's responsibilities are wholly different from those at issue in *Humphrey's Executor* and *Wiener*. The independent counsel does not exercise "quasi-legislative" or "quasi-judicial" power or have duties of an "intrinsic judicial character." In the Constitution's language, her sole job is to "execute" the criminal law, a duty the Constitution vests in the President, and no one, therefore, can be more a "purely executive" officer than she. This conclusion is reinforced by the character of the functions and offices that the independent counsel supplants. Cf. *Chadha*, 462 U.S. at 952-953. The independent counsel is vested with full authority, in connection with the alleged crimes under her jurisdiction, "to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice" (28 U.S.C. 594(a)). The Attorney General, as the chief federal prosecutor and the head of an executive department, must serve only at the pleasure of the President. Within her jurisdiction, an

independent counsel is the chief federal prosecutor and the head of the Attorney General's Department. Accordingly, she too must serve at the pleasure of the President (or of someone, such as the Attorney General, who so serves). See *Chabal* v. *Reagan*, No. 87-5751 (3d Cir. Mar. 14, 1988), slip op. 5-7, 8-10 (United States Marshals are "purely executive officers" who may be removed by the President at will); *Morgan* v. *TVA*, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941) (head of TVA removable at will).

We emphasize that the removability of members of "independent agencies" presents a quite different question. First, those officers are appointed by the President with Senate consent, so the question in those cases is not one of total elimination of accountability to the President. Second, Congress has specifically withheld from those agencies the purely executive power of criminal law enforcement.[27] Third, those agencies, unlike independent counsels, frequently carry out specific adjudicatory, information-gathering, and other functions that may not be uniquely assignable to the Executive Branch. Fourth, the statutory provisions that insulate members of independent agencies from removal at will by the President vary considerably and might be interpreted to include disobedience to a presidential directive on a matter within the President's authority as a ground for removal and thus to impose barriers significantly lower than "misconduct" (see p. 13, *supra*).[28] The Court need

[27] See, *e.g.*, 15 U.S.C. 56(b) (FTC must refer criminal matters to Attorney General); 15 U.S.C. 77t(b) (same for SEC); 15 U.S.C. 2076(b)(7)(B) (same for CPSC); 47 U.S.C. 401(c) (same for FCC); 49 U.S.C. (& Supp. III) 11703 (same for ICC). See also 28 U.S.C. 547 (criminal prosecution reserved to U.S. Attorneys, under the direction of the Attorney General, "except as otherwise provided by law"); 2 U.S.C. 437d(a)(6) (FEC given only civil enforcement power); 7 U.S.C. (& Supp. IV) 4a(e), 13a-1 (same for CFTC); 42 U.S.C. 7171(i) (same for FERC).

[28] See, *e.g.*, 15 U.S.C. 2053(a) (CPSC: removable for "neglect of duty or malfeasance in office but for no other cause"); 47 U.S.C. 154(c) (FCC: no specified standard for removal); 12 U.S.C. (&

not address the significance of those distinctions here: the constitutionality of independent agency removal arrangements is neither at issue nor at stake in this case.

IV. NEITHER THIS COURT'S DECISIONS NOR PRIOR FEDERAL PRACTICES PROVIDE PRECEDENT FOR VESTING PURELY EXECUTIVE POWER IN AN OFFICER WHO IS APPOINTED BY A COURT AND IS NOT ACCOUNTABLE TO THE PRESIDENT

Appellant and her amici seek support for the independent counsel statute in certain judicial decisions, particularly *Ex parte Siebold*, 100 U.S. 371 (1880). But neither *Siebold* nor any other decision of this Court holds that a court may appoint an executive officer, much less one who is not accountable to the President. Nor have appellant and amici identified any other instance in which Congress has even attempted to transfer purely executive power, such as criminal law enforcement authority, to such an officer.

A. *Siebold* arose under an Act of Congress that authorized a federal court to appoint election supervisors to help preserve the integrity of congressional elections. Several state officials were convicted of violating a prohibition against interfering with the supervisors in the performance of their official duties. The defendants' principal contention in this Court was that Congress's power to regulate the election of Representatives (Art. I, § 4) did not permit it to displace state regulation only partially—*i.e.*, that Congress had to do so completely or not at all. Most of the Court's opinion (100 U.S. at 382-397) is devoted to rejecting that contention.

The defendants also argued that Congress could not constitutionally authorize judicial appointment of the election supervisors. In a brief discussion (100 U.S. at

Supp. IV) 2, 1812 (FDIC: removable by President for "reasons to be communicated by him to the Senate"); 12 U.S.C. 242 (Federal Reserve Board: removable for cause); 15 U.S.C. 41 (FTC: removable for inefficiency, neglect of duty, or malfeasance in office); 15 U.S.C. 78d(a) (SEC: no specified standard for removal).

397-398), the Court rejected that contention as well. The Court explained that it "is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such offices appertain" (*id.* at 397). But the Court said that there is "no absolute requirement to that effect" in the Appointments Clause and that "it would be difficult in many cases to determine to which department an office properly belonged" (*ibid.*). Accordingly, the Court stated that "the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress" (*id.* at 397-398), although it also stated that the principle of *Hennen*—that the Appointments Clause was intended to allow appointment by the Branch to which the official to be appointed "'most appropriately belonged'" (100 U.S. at 398 (citation omitted))—"express[ed] the law or rule by which [Congress's power to select the appointing authority] should be governed" (*ibid.*). Without endorsing the defendants' characterization of the election supervisors' duties as "entirely executive in character" (*id.* at 397), the Court sustained their appointments: it concluded that there was no "incongruity" in court appointment of the supervisors and that neither the President nor the head of a department would have been equally suited to the task (*ibid.*).

Siebold does not answer the Appointments Clause challenge to the independent counsel statute (or even address the basic Article II challenge). First, the decision has no bearing on the question whether an independent counsel can be an inferior officer, because the case involved no question of whether the election supervisors were inferior officers.[29] Second, on the question of judicial

[29] Because election supervisors had no guaranteed tenure (Rev. Stat. § 2012 (1873 ed.)), they were removable at will by, and hence were subordinate (and hence "inferior") to, the courts that appointed them. See *Hennen*, 38 U.S. (13 Pet.) at 259. Election supervisors also appear to have been subordinate to the chief supervisors in their jurisdictions. Rev. Stat. § 2026 (1873 ed.); see H.R. Rep. 218, 44th Cong., 2d Sess. 35-36, 42-45 (1877).

appointment of executive officers, the decision does not stand for the proposition that a federal prosecutor, such as an independent counsel, may be appointed by a court.

Siebold concerned borderline, hard-to-classify officers whose functions were held not incongruous with judicial appointment and were not uniquely within the province of the Executive Branch. The only duty of the election supervisors actually at issue in the case was quite limited: at the time the defendants interfered, the supervisors were entering the voting room at the beginning of the day to see if the ballot box was empty (100 U.S. at 378, 379). Even the duties of the supervisors that were not at issue (*e.g.*, checking voters against registration lists, securing ballot boxes, and reporting irregularities to the chief supervisor and Congress) were essentially investigative in nature and were both minimally intrusive and closely related to the task of protecting against election fraud. Since, as the Court explained, "it must be remembered that we are dealing only with the subject of election of representatives to Congress" (*id.* at 393), those functions could have been performed directly by Legislative Branch officers, pursuant to the power of each House to judge its own elections (Art. I, § 5, Cl. 1).[30] See *Buckley*, 424 U.S. at 137-138; *Barry* v. *United*

[30] We see no reason why all of the supervisors' functions described by amici (Walsh Br. 15; Sen. Br. 38; see generally Rev. Stat. §§ 2011-2029 (1873 ed.)), including the arrest of persons who impeded their functions, could not be performed by Legislative Branch officers, in the service of securing and judging congressional elections. See *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821) (Congress's Sergeants at Arms may arrest and imprison persons for contempt of Congress). In any event, the marshal or deputy marshals generally made the arrests, at the supervisors' instance (H.R. Rep. 218, *supra*, at 34-36 (supervisors' instructions)); the supervisors' power to arrest, cited by amicus Walsh (Br. 15), existed only "in the absence of the marshal's deputies, or if required to assist said deputies" (Act of Feb. 28, 1871, ch. 99, § 8, 16 Stat. 436; Rev. Stat. § 2022 (1873 ed.))—circumstances

States ex rel. Cunningham, 279 U.S. 597, 616 (1929). That Congress may, without incongruity, direct the courts to appoint officers to assist in the performance of a legislative function, especially one that is "judicial in character" (*id.* at 613), does not suggest that Congress may transfer from the Executive Branch to the courts the power to appoint purely executive officers who carry out the President's duties.

The analysis in *Buckley* underscores the distinction between *Siebold* and this case. The Court in *Buckley* applied the Appointments Clause by examining the functions of the Federal Election Commission, and it concluded that compliance with the Clause was simply irrelevant to the validity of any functions that Congress *could have* assigned to someone who was not appointed in accordance with the Clause. Of particular relevance here, the Court noted that Congress can engage in investigative and informational functions in aid of the legislative process and may compel the presence of witnesses to that end (424 U.S. at 138; *McGrain* v. *Daugherty*, 273 U.S. 135, 175 (1927)), and it held that FEC Commissioners, while they could not exercise "discretionary powers to seek judicial relief," could perform investigative and informational functions (*id.* at 137-138). The election supervisors in *Siebold*, as we have explained, performed essentially similar functions.

To the extent that *Siebold*'s references to the absence of any "absolute" barriers and to congressional "discretion" suggest *unconstrained* discretion to vest the appointment of *any* inferior officer in *any* of the three appointing authorities named in the second portion of the Appointments Clause, the suggestion is incorrect (and would allow, *e.g.*, judicial appointment of military officers). But *Siebold*'s ambiguous words need not and should not be read to mean that Congress is subject to no limitations at all, and there are good reasons, even aside

---

in which even private citizens are generally permitted to make or assist in an arrest (see Rev. Stat. § 2024 (1873 ed.); *Model Penal Code* § 3.07 (1985)).

from the narrowness of the facts of the case and the brevity of the Court's analysis, for not treating such dicta as disposing of the question of inter-Branch appointments. Notably, the government's brief did not address the appointment issue at all, and the portion of the defendants' brief devoted to that issue did not cite any of the materials that shed light on the Framers' intent beyond the text of the Clause itself (see Pet. Br. 85-86, *Ex parte Siebold*, *supra*). Given the evidence of purpose now before the Court and the intervening analysis in *Myers*, *Buckley*, *Chadha*, and *Synar*, the ambiguous dicta in *Siebold* do not support judicial appointment of an independent counsel.

B. The other materials cited by appellant and her amici offer no greater support for the independent counsel statute. Appellant relies (Br. 50) on "[c]itizen involvement in law enforcement." But aside from the obviously irrelevant examples of civil lawsuits brought under federal statutes by private citizens *on their own behalf* (*id.* at 50 & n.69), appellant cites only one even conceivably pertinent federal statute, 31 U.S.C. 3730(b), which authorizes a private party to bring a qui tam action on behalf of the United States. That provision, however, authorizes a private party to bring only a civil action for a money judgment (31 U.S.C. 3730(b)); responsibility for criminal prosecutions is committed to the Executive Branch (18 U.S.C. 287).[31] Furthermore,

---

[31] There is no history in the federal system of qui tam criminal prosecutions. See *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-549 (1943). *United States* v. *Trobe*, 28 F. Cas. 217 (D.C.W.D. Pa. 1865) (No. 16,541); *United States* v. *Malebran*, 26 F. Cas. 1145 (C.C.D.N.Y. 1820) (No. 15,711); Comment, *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement*, 20 UCLA L. Rev. 778 (1973). Cf. *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973) ("in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another"). Nor is it clear to what extent, if any, even the quite different English, colonial, and state systems have allowed criminal prosecutions to be fully controlled by private persons. See Note, *The History and Development of Qui Tam*, 1972 Wash. L.Q. 81.

the statute expressly permits the Executive Branch to take over any civil action at the outset (31 U.S.C. 3730 (b)(2); see also 31 U.S.C. 3730(b)(4)). See also 25 U.S.C. 201. In any event, the possible involvement of private parties in no way suggests that where law enforcement, particularly criminal prosecution, is undertaken by the federal government itself, Congress may ignore the separation of powers and assign that function to an officer who is appointed by a court and unaccountable to the President.

Equally misplaced is appellant's and amici's reliance (App't Br. 40-41; CC Br. 13-14) on the independence of the Attorney General in England, judicial appointment of prosecutors in some States, and the widespread pattern in the States of electing Attorneys General and prosecutors. Such arrangements shed no light on the allocation of appointing power or accountability to the President under the federal Constitution, which differs markedly from the constitutions of the various English, colonial, and state governments. See Seymour Br. App. 1a-2a, 4a. The Framers, of course, were well aware of these different structural approaches, including the differences in appointment power, and they deliberately departed from those approaches. See *The Federalist No. 47*, at 300-308 (Madison).

Consistent with the structure the Framers adopted, ever since the enactment of the Judiciary Act of 1789 (§ 35, 1 Stat. 92), United States Attorneys have been appointed by the President, with the advice and consent of the Senate, and have been subject to direction and removal by the President. In 1831, then-Attorney General Taney explained that the President's power to direct the "district attorneys" "is necessarily implied by the duties imposed upon him in that clause of the constitution before referred to, which enjoins him to take care that the laws be faithfully executed." *The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482, 487.[32] To be sure, Con-

[32] Given the *President's* right of control, it is irrelevant for constitutional purposes whether district attorneys were afforded con-

gress has authorized district courts to fill a vacancy in the office of United States Attorney on an interim basis (28 U.S.C. 546, as amended by the Act of Nov. 10, 1986, Pub. L. No. 99-646, § 69, 100 Stat. 3616). But although that provision was upheld in *United States* v. *Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963), this Court has not considered its validity; and even the *Solomon* court stressed that the appointment was temporary, the appointee was fully subject to control by the President, and the statute was not intended to displace the President's authority (*id.* at 842-843).

The fact that the Senate Committee's first draft of the Judiciary Act of 1789 proposed judicial appointment of the Attorney General and "district attorneys" (see App't Br. 41-42; CC Br. 14; Walsh Br. 16 n.15) cannot offer support for the independent counsel statute, as Judge Ginsburg pointed out in her dissent below (see J.S. App. 122a-123a n.41). That proposal did not even survive in the final Senate bill, and it was not enacted by Congress, which instead chose to provide for presidential appointment and Senate confirmation. Moreover, even under the rejected proposal, there is no indication that the Attorney General and district attorneys would have been insulated from presidential direction.

Nor does the independent counsel statute find any support in the provision in the Judiciary Act of 1789 for a court to "appoint" a disinterested person to serve writs in a suit in which the marshal or deputy marshal was a party (§ 28, 1 Stat. 87; see Walsh Br. 16 n.15). It is not clear that the person designated to serve the writ was expected to become an officer of the United States,

siderable independence as a practical matter and whether they were subject to the supervision of the Attorney General or of some other Executive Branch officer (see App't Br. 52-53). In fact, there was some supervision from the beginning. See L. White, *The Federalists: A Study in Administrative History* 406 (1948); Act of May 26, 1824, ch. 163, 4 Stat. 44. It is likewise irrelevant that the district attorneys, who were sworn in as officers, were "private lawyers who worked on the basis of fees for services rendered" (CC Br. 15 (footnote omitted)).

and the service of process is hardly a function that can be performed only by officers of the Executive Branch. See Fed. R. Civ. P. 4(c); cf. *Siebold*, 100 U.S. at 397.[33] United States Commissioners, also mentioned by appellant and amici (App't Br. 34; Walsh Br. 16-17), were merely the predecessors of United States Magistrates and hence were clearly judicial, not executive officers.[34] Finally, the

---

[33] Judicial appointment of District of Columbia school board members (App't Br. 34 n.42, 40; H.R. Spkr. Br. 21 n.30) was upheld in *Hobson*, 265 F. Supp. at 914-915. But Congress has plenary legislative power over the District of Columbia (Art. I, § 8, Cl. 17), and its officers need not be appointed pursuant to the Appointments Clause. A similar plenary power over the territories (Art. IV, § 3, Cl. 2) was at issue in 6 Op. Att'y Gen. 80 (1853), relied upon by amicus Common Cause (Br. 15).

[34] In *United States v. Allred*, 155 U.S. 591, 595 (1895), the Court observed that Commissioners "have always been considered in the same light as masters in chancery and registers in bankruptcy, and subject to [judicial] supervision and control." See also *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 353 n.2 (1931) (Commissioner is "a mere officer of the district court"). Among the duties ascribed to such Commissioners (see *Allred*, 155 U.S. at 594-595; *Rice* v. *Ames*, 180 U.S. 371, 377-378 (1901); *Go-Bart Importing Co.*, 282 U.S. at 353 n.2), only the power to "institute prosecutions," emphasized by amicus Walsh (at 16) suggests a prosecutorial power. But appellant and her amici have pointed to no instance of its use, and the statute from which the phrase comes, 8 U.S.C. (1934 ed.) 49; Rev. Stat. § 1982 (1873 ed.), is not fairly read to give Commissioners such power. The provision says that "district attorneys, marshals, and deputy marshals, the commissioners * * * with power to arrest, imprison, or bail offenders, and [other officers] * * * are authorized and required * * * to institute prosecutions against [specified persons] * * * and to cause such persons to be arrested, and imprisoned or bailed, for trial." Almost certainly, each person named in the first portion was to perform the obviously corresponding duty in the second portion—so that deputy marshals were not suddenly to have power to grant bail, and Commissioners were to perform only their usual duties of issuing arrest warrants and ordering imprisonment or bail. The succeeding section supports this reading. 8 U.S.C. (1934 ed.) 50; Rev. Stat. § 1983 (1873 ed.) (Commissioners are to exercise powers "conferred on them herein" "in like manner as they are authorized by law to exercise with regard to other offenses").

special prosecutors of Teapot Dome, the Truman Administration, and Watergate (CC Br. 15-17; Sen. Br. 27-28) were all appointed by the President or the Attorney General and were ultimately accountable to the President. It was, of course, precisely that relationship that the Ethics in Government Act sought to change.

V. THE INDEPENDENT COUNSEL STATUTE IS NOT CONSTITUTIONALLY JUSTIFIED BY CONGRESS'S DESIRE TO ELIMINATE SUPPOSED CONFLICTS OF INTEREST IN CERTAIN CRIMINAL INVESTIGATIONS AND PROSECUTIONS

Appellant and her amici seek to defend the independent counsel statute as necessary to eliminate supposed "conflicts of interest" that might arise if certain criminal investigations and prosecutions were left to officers accountable to the President. But no such argument of convenience can render constitutional an extra-constitutional legislative creation or "warrant a distortion of the Framers' work" (*Buckley*, 424 U.S. at 134). "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government" (*Chadha*, 462 U.S. at 944; see *Synar*, slip op. 20).[35]

A. Appellant contends (Br. 48-49) that this Court's decisions in *Nixon* v. *Administrator of General Services*,

---

[35] Amicus Walsh argues (Br. 2-17) that the Necessary and Proper Clause (Art. I, § 8, Cl. 18) gives Congress the power to adopt the independent counsel statute as an appropriate response to the perceived problem. But that Clause adds nothing to the analysis. While Congress doubtless has broad power under that Clause to create offices and to structure the Executive Branch, the Clause does not allow Congress to adopt measures that violate other provisions of the Constitution. In *Buckley*, 424 U.S. at 134-135, this Court rejected a nearly identical argument. See *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Necessary and Proper Clause permits measures that "are not prohibited, but consistent with the letter and spirit of the constitution").

433 U.S. 425 (1977), and *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), call for a balancing approach, under which policy arguments in defense of the independent counsel statute might be considered. In appellant's view, a balancing approach is appropriate because the independent counsel statute does not result in aggrandizement of one Branch at the expense of another. Appellant is wrong. The statute divests the President and the Senate of their important roles in selecting and approving the appointment of executive officers who wield important governmental powers, and divests the President of his responsibility for certain criminal prosecutions, while it aggrandizes the Judicial Branch by vesting it with the executive power of appointment (and powers to define prosecutorial jurisdiction and to terminate the office). But even where such aggrandizement is absent, *Nixon* and *Schor* do not suggest resort to a balancing test if particular structural provisions of the Constitution are violated. Neither decision involved the Appointments Clause or removal authority; neither involved a congressional action whose aim was to transfer authority away from the Branch that is entrusted with it by the Constitution; and neither suggested that it is ever appropriate to consider Congress's policy reasons for a deliberate assault on another Branch's authority.

In *Nixon*, the Court rejected a facial challenge, based only on general separation-of-powers notions, to a statute that directed the Administrator of General Services to promulgate and apply regulations governing the disposition of presidential materials. As the Court emphasized, the statute assigned the duty to an "official of the Executive Branch, appointed by the President" (433 U.S. at 441; see also *id.* at 443), left the Executive Branch "in full control of the Presidential materials" (*id.* at 444), and preserved the President's power to assert any claims of privilege (*id.* at 444-445). There was no displacement of Article II authority.

Schor did not involve Article II and the Executive Branch at all, but rather the distinctive body of law governing Article III and the Judicial Branch. The Court upheld a statute that authorized the CFTC to rule in the first instance on certain counterclaims, because (1) the CFTC jurisdiction over the counterclaims was entirely voluntary with the parties (slip op. 13-15, 20); (2) it was not Congress's aim to withdraw the counterclaims from the cognizance of the Article III courts (slip op. 20); and (3) the courts retained quite broad power to review CFTC decisions (*id.* at 16-22). The Court, while considering congressional purposes, in no way suggested that if the underlying congressional aim had been to transfer authority away from the Judicial Branch or to deprive litigants of their right to present their claims to an Article III court, it would have been relevant to consider whether Congress might be able to articulate good reasons for such an assault on the constitutional structure. In this case, of course, Congress's express purpose was precisely to deprive the President of an important part of his Article II power, which in turn involuntarily subjects persons like appellees to investigations and prosecutions by a person outside the Article II structure.

B. Quite aside from the various structural impediments to application of a balancing test here, the conflict-of-interest concerns that appellant and her amici seek to weigh in the balance are addressed by the Constitution itself or may be addressed by Congress and the President pursuant to their powers, under the Necessary and Proper Clause and the Take Care Clause, to prescribe rules of conduct for executive officials.

1. To the extent that Congress was concerned about possible conflicts of interest of particular prosecutors, including any Department of Justice official up to and including the Attorney General, those problems may be fully addressed by statutes and regulations that require personal disqualification in particular matters, leaving them to be handled by other persons who are unaffected by a conflict. Congress has made it a crime in a broad class of situations for a federal prosecutor to participate substantially and personally in matters in which he has

a financial interest. 18 U.S.C. 208. Congress has also directed the Attorney General to promulgate regulations requiring disqualification of lawyers and others where a personal, financial, or political conflict, or its appearance, would otherwise result. 28 U.S.C. 528. The Department of Justice has done so. 28 C.F.R. Pt. 45; *Young*, slip op. 15-16. See also Exec. Order No. 11,222, 3 C.F.R. 306 (1964-1965 comp.) (federal employees may not have financial interests that conflict with their duties). Further and more stringent statutes on this subject could be adopted.

If Congress were to conclude that the Attorney General and the entire Department of Justice might be burdened by a conflict of interest in certain matters involving high-level executive officials, it could constitutionally establish a separate office within the Executive Branch and provide for presidential appointment, with consent of the Senate, of a person to fill that office. See Frey & Geller, *Better Than Independent Counsels*, The Washington Post, Feb. 14, 1988, at C7; H. Baker, *The Proposed Judicially Appointed Independent Office of Public Attorney: Some Constitutional Objections and an Alternative*, 29 Sw. L.J. 671, 682-683 (1975). Indeed, this and other possible measures would be available within the constitutional structure even if Congress believed at a particular time that every person then in the Executive Branch, except the President, suffered from a conflict of interest. It is only the President whose power and duties must be preserved under Article II.

2. The congressional concerns that underlie the independent counsel statute thus reduce, in the end, to a concern about the President himself. The independent counsel statute rests on Congress's belief that, in certain cases, there is a "fundamental institutional conflict of interest" in having the President remain accountable for a criminal investigation and prosecution (H.R. Rep. 95-1307, *supra*, at 2). But as that statement betrays, and as the Senate Committee later stated explicitly, that conflict is "inherent in our system of government" (S. Rep. 97-496, *supra*, at 4). In this respect, it is like the con-

flict inherent in the courts' deciding cases affecting judges' pay (see *United States* v. *Will*, 449 U.S. 200, 214 (1980); *Atkins* v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978)) and in Congress's deciding whether particular laws will apply to it. It is not for Congress, outside the Article V amendment process, to decide that the structure established by the Framers is defective and to assume to cure the defect.

Such attempts to improve upon the Constitution are especially unwarranted where, as here, they concern a problem the Framers specifically addressed. The Framers comprehensively considered the conflicts of interest that might result from occupying various offices under the new Government, and the Constitution contains numerous provisions that address the subject. *E.g.*, Art. I, § 6 (no Senator or Representative may be appointed to civil office that was created or the emoluments of which were increased during the time for which he was elected; no person holding any office under the United States shall be a Member of either House); *id.* § 9, Cl. 8 (no person holding public office may accept foreign gifts, emoluments, offices, or titles without congressional consent); Art. II, § 1, Cl. 2 (no Senator or Representative or person holding office may be an elector); *id.* § 1, Cl. 7 (President's salary not to be increased or decreased during time for which he is elected and President may not receive other emoluments from the United States or any State). The Framers did not, however, include a provision requiring the disqualification of the President from exercising his broad powers under Article II in these or any other circumstances.[38] Moreover, the

---

[38] Notably, in the Convention, Edmund Randolph proposed to exclude "cases of treason" from the pardon power, arguing: "The President may himself be guilty. The Traytors may be his own instruments." 2 *Farrand* 626. Other members of the Convention, including George Mason and James Madison, shared the concern (*id.* at 626-627), but it was objected that if the President "be himself a party to the guilt he can be impeached and prosecuted" (*id.* at 626 (James Wilson)). See *The Federalist No. 74*, at 449 (Hamilton); 4 *Elliot's Debates* 111-112 (James Iredell); 2 *id.* at

Constitution's provision for the advice and consent of the Senate was designed to furnish precisely the sort of check on "any incautions or corrupt nomination by the Executive" (2 *Farrand* 43 (Madison)) or the appointment of "obsequious instruments of his pleasure" (*The Federalist No. 76*, at 458 (Hamilton)) that Congress sought to provide by vesting appointment of the independent counsel in a court. The Constitution therefore fully accommodates Congress's concern with ensuring the appointment of a prosecutor having the requisite qualities of integrity, fairness, and determination.

3. Most important, the Constitution provides for impeachment (Art. II, § 4) specifically to deal with abuses of power by the President and other officers, and the Framers quite deliberately chose to vest the high responsibility of impeachment in bodies that themselves are politically accountable to the people (Art. I, § 2, Cl. 5 (House has the sole power to impeach); *id.* §3, Cl. 6 (Senate has the sole power to try impeachments)). See *The Federalist No. 65*, at 396-401 (Hamilton); *id.* at 397 (in this "NATIONAL INQUEST into the conduct of public men[]," "who can so properly be the inquisitors for the nation as the representatives of the nation themselves?"); 4 *Elliot's Debates* 114 (James Iredell). The Framers understood that impeachment was a remedy of real substance.[37] The role they expected that mechanism to play is demonstrated by the express exemption of impeachment from the President's otherwise plenary pardon power. Art. II, § 2, Cl. 1. The

497-498 (Mason and Madison). The Framers rejected the exception, despite the "conflict of interest," and relied on impeachment as a remedy. There is no greater constitutional justification for an independent counsel than for an independent pardon authority.

[37] See *The Federalist No. 65*, at 396-401 (Hamilton); *Id. No. 69*, at 416 (Hamilton); *Id. No. 77*, at 464 (Hamilton); *Id. No. 81*, at 485 (Hamilton); *Id. No. 84*, at 511 (Hamilton); 2 *Farrand* 67-69; *Story* 282-290; P. Hoffer & N. Hull, *Impeachment in America, 1635-1805*, at 96-106 (1984); *id.* at 146 ("By 1975, impeachment had proved itself an effective and a fair tool of republican government.").

Framers adopted this exemption specifically to insure against presidential protection of "high officers of state" (4 *Elliot's Debates* 113)—who, once removed, could still be prosecuted "in the ordinary course of law" (see *The Federalist No. 65*, at 399 (Hamilton)). Justice Story explained (*Story* 551) that the exemption from the pardon power "takes from the President every temptation to abuse it in cases of political and official offenses by persons in the public service." The exemption was designed as a "check upon his power, so that he cannot by any corrupt coalition with favourites, or dependents in high offices, screen them from punishment."

The independent counsel statute seeks to bypass the impeachment process that the Framers designed to guarantee both that high officers of government could be investigated and removed from office and that the President, himself subject to impeachment, could be prevented from protecting his "favourites, or dependents in high offices." The Framers assigned the impeachment mechanism to Congress because they wanted the responsibility of dealing with high government misconduct to rest in a politically accountable assembly. Just as the President may not be divested of or avoid his responsibilities under the Take Care Clause, Congress may not avoid its often difficult, but no less crucial, duty of overseeing the Executive Branch through the means the Constitution provides for that task.

4. Of course, less drastic tools than impeachment are available under the Constitution. Ever since 1789, those tools have been used with great frequency. The regular prosecutorial organs of the Department of Justice may be, and have been, used to prosecute high ranking officials. See *United States* v. *Agnew*, 428 F. Supp. 1293 (D. Md. 1977).[38] Congress may create or provide for the

[38] See also *Connelly* v. *United States*, 249 F.2d 576 (8th Cir. 1957), cert. denied, 356 U.S. 921 (1958) (Assistant Attorney General and Appointments Secretary under President Truman); *Miller* v. *United States*, 24 F.2d 353 (2d Cir.), cert. denied, 276 U.S. 638 (1928) (Attorney General under Presidents Harding and Cool-

creation of permanent watchdog offices like the Inspector General Offices (5 U.S.C. (& Supp. IV) App. at 987-993) or the Office of Professional Responsibility of the Justice Department (28 C.F.R. 0.39). It may establish an agency of government to address official misconduct or create a separate unit within an existing department, like the Public Integrity Section in the Justice Department's Criminal Division. It may create special prosecutor offices, or authorize their administrative creation, on a case-by-case basis.[39] These approaches have hardly proved useless: through such normal mechanisms and through the statutory or regulatory creation of special prosecutors, high-level executive officers serving under Presidents Jefferson, Grant, Hayes, Theodore Roosevelt, Harding, Coolidge, Truman, and Nixon were prosecuted, and many others have been investigated. See generally *Responses of the Presidents to Charges of Misconduct* (C. Vann Woodward ed. 1974). Congress also has broad powers to conduct its own investigations short of impeachment, as it did, for example, in the Watergate and Iran/Contra hearings. See *McGrain* v. *Daugherty*, *supra* (investigation of Attorney General's failure to prosecute

idge); *United States* v. *Babcock*, 24 F. Cas. 913 (C.C.E.D. Mo. 1876) (No. 14,487) (President Grant's personal secretary); *United States* v. *Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693) (Vice President, 1801-1805, prosecuted by district attorney).

[39] Pursuant to statute, President Coolidge appointed a special prosecutor, with Senate consent, to investigate wrongdoing in connection with the Teapot Dome leases. Act of Feb. 8, 1924, ch. 16, 43 Stat. 5-6. A special prosecutor's office was created within the Justice Department in the Nixon Administration. *United States* v. *Nixon*, *supra*. The Attorney General appointed an independent counsel in 1979 to investigate the relationship between the Carter Warehouse and the National Bank of Georgia. 44 Fed. Reg. 25837 (1979). All of the current independent counsels have been offered, and several have accepted, appointments as special prosecutors within the Department of Justice. See also *Jones* v. *United States*, 179 F. 584, 586-590 (9th Cir. 1910) (special prosecutor appointed by Attorney General); *Tyner* v. *United States*, 23 App. D.C. 324, 363 (D.C. Cir. 1904) (special prosecutor appointed by President Roosevelt).

alleged corruption).[40] And Congress has numerous means of applying political pressure to help secure the President's faithful execution of the laws. There is no warrant after 200 years of experience under the Constitution for the independent counsel statute's extra-constitutional means of addressing a problem that the Constitution itself furnishes ample means to address, through properly accountable institutions of government.

[40] See, *e.g.*, *Hearings on the Investigation of Regulatory Commissions and Agencies Before the Special Comm. on Legislative Oversight of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. 525, 1384-1389 (1958) (Sherman Adams, under President Eisenhower); S. Rep. 27, 69th Cong., 1st Sess. (1926) (Sec'y of Treasury Mellon, under President Coolidge); H.R. Rep. 3142, 49th Cong., 1st Sess. (1886) (Attorney General Garland, under President Cleveland); H.R. Rep. 186, 44th Cong., 1st Sess. (1876) (Sec'y of War Belknap, under President Grant); H.R. Rep. 684, 29th Cong., 1st Sess. (1846) (Sec'y of State Webster, under President Tyler); 3 Annals of Cong. 963 (1793) (Sec'y of State Hamilton, under President Washington); *Responses of the Presidents to Charges of Misconduct*, *supra*. See also S. Rep. 96-1015, 96th Cong., 2d Sess. (1980) (Billy Carter, brother of President).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

LOUIS R. COHEN
WILLIAM C. BRYSON
Deputy Solicitors General

JAMES M. SPEARS
ROBERT J. CYNKAR
Deputy Assistant Attorneys General

EDWIN S. KNEEDLER
RICHARD G. TARANTO
Assistants to the Solicitor General

ROBERT E. KOPP
DOUGLAS LETTER
THOMAS M. BONDY
Attorneys

APRIL 1988

☆ U. S. GOVERNMENT PRINTING OFFICE: 1988 202037 60383